Supreme Court, U.S.
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No. 05-1399

In The

Supreme Court of the United States

HUGH HARDAGE,

Petitioner,

v.

CBS BROADCASTING, INC., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. REPLY TO BRIEF IN OPPOSITION

In *Faragher* and *Ellerth*, the Supreme Court held that employers are vicariously liable for a hostile work environment created by managers and supervisors with one exception: where the employer took appropriate steps to prevent *and* correct *any* sexually harassing behavior *and* the employee unreasonably failed to complain.[1] The stated rationale for the exception is grounded in traditional negligence principles: an entity should not be liable for the bad acts of its agents when it lacks notice.

The Ninth Circuit ignored the basic principle underlying the affirmative defense when it held that even where the employer is *on notice* of sexually harassing behavior, it proves both elements of the affirmative defense, *as a matter of law*, where it takes no preventive or corrective action other than to offer to the employee that the company do nothing, the employee handle it on his/her own, or the employer speak "nicely" to the harasser and ensure that he/she does not get into any trouble. The Ninth Circuit's new rule of law is grossly at odds with Supreme Court precedent and creates a circuit split that merits review.

The Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000) was critical to clarify the varied standards regarding the plaintiff's burden of proof to survive judgment as a matter of law in a disparate treatment case where the employer has proffered a legitimate, non-discriminatory reason for its actions (the pretext plus issue). Similarly, a decision here is crucial to enunciating the employer's burden of proof on summary judgment of the *Faragher/Ellerth* affirmative defense.

The facts in this case, *viewed in the light most favorable to Hardage*, demonstrate that CBS had notice of unwanted sexual advances and did nothing to prevent *and* correct the harassing behavior. Therefore, Hardage respectfully requests that the Court dispose of this case on the merits, pursuant to Sup. Ct. R. 16(1), by reversing the Ninth Circuit Majority

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[1] *Faragher v. City of Boca Raton*, 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998).

opinion and remanding this case to the District court for a jury to decide the factual issue of whether CBS can establish the elements of the *Faragher/Ellerth* affirmative defense.

In the alternative, Hardage requests that the Court grant his Petition to clarify whether an employer can establish the *Faragher/Ellerth* affirmative defense *as a matter of law*, when the employer knows that its General Manager has repeatedly made unwanted sexual advances towards an employee, the employee seeks assistance from the employer to correct the harassment, and the employer's only response is to tell the employee that he/she can "do absolutely nothing," handle it on his/her own, or have the employer "very nicely talk with" the harasser to "just lay back on this a little bit." The Ninth Circuit's answer in the affirmative conflicts with the purpose of the *Faragher/Ellerth* affirmative defense: to encourage employers to take all necessary steps to prevent sexual harassment from occurring and to promptly correct any sexually harassing behavior that does occur.

A. CBS Waived Its Opportunity To Contest The Statements Of Law And Fact In The Petition.

The rules of this Court admonish respondents to address any perceived misstatements of fact or law in its opposition to a petition for a writ of certiorari. A respondent waives its right to object to the petition's statement of the proceedings below if the respondent does not raise its objections in its brief in opposition to the petition. Sup. Ct. R. 15(2) and 15(3). CBS conceded the accuracy of Hardage's statement of the case when it filed an express waiver of its right to file a brief in opposition. App. 151-153.[2] After the Court requested a response from CBS, it submitted its Brief in Opposition that relies almost exclusively on factual and legal objections that it had already waived. In accordance with Sup. Ct. R. 15(2),

[2] App. 1-150 are attached to Hardage's Petition and App. 151-167 are attached to this Reply.

Hardage requests that the Court deem CBS' objections waived and accept the Petitions' statement of the case.[3]

B. CBS' Opposition Brief Presents Facts In The Light Most Favorable To CBS And Misstates The Opinions Below.

In reviewing a motion for summary judgment or for judgment as a matter of law, a "court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* (internal quotations omitted). "Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe." *Id.*, at 151. The evidence in favor of the moving party that a court may give credence to is limited to uncontradicted and unimpeached evidence coming from *disinterested witnesses. Id.*

1. CBS Was On Notice Of The Harassment.

Despite this standard, CBS construes the facts in its favor to support its argument that CBS was unaware of Kathy Sparks' sexually harassing behavior. (Br. in Opp. 3-5, 7-17).[4] Yet, the opinions below recognize CBS' knowledge of Sparks' sexually harassing behavior:

- "Hardage did put CBS on notice of Sparks' 'unwanted sexual advances.'" App. 15.
- Dean [Hardage's supervisor] responded to Hardage's complaints of unwanted sexual advances by telling

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[3] To the extent CBS' version of the facts is considered, it merely highlights that there were genuine issues of material fact in dispute.

[4] CBS details irrelevant, inflammatory, and unduly prejudicial allegations implying that Sparks' conduct was welcome. However, the courts below and CBS recognized that Sparks' repeated sexual advances were unwelcome. Regardless, that type of evidence is inadmissible. *Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959 (8th Cir. 1993).

him to "just do it and get it over with. It may put her in a better mood." App. 6 and 15.

- "[Hardage] alleges that he made 'numerous complaints' to Dean and repeatedly told her he did not want to be left alone with Sparks" and that his fear of being left alone with Sparks was an ongoing joke for Dean. App. 16.[5]
- "Dean personally observed some of Sparks' harassing behavior." App. 17.[6]
- "Hardage testified that he told both Dean and Falcone that Sparks had made unwanted sexual advances, and Dean herself testified that she understood that Hardage was complaining about sexual harassment." App. 29 (9th Cir. dissent); *see also*, App. 157-159, 161.
- Hardage "told Dean that he wanted to file a formal complaint for sexual harassment against Sparks." App. 47 (District Court Order).

Moreover, Dean admitted in her testimony that Hardage complained to her about sexual harassment:

> Q. During the time that you have worked for KSTW, has anyone ever come to you with a complaint of sexual harassment?
> A. Yes.
> Q. When was that?
> A. I don't know. I don't know the actual date.

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[5] The majority improperly discounted Hardage's numerous complaints about unwanted sexual advances because he could not remember the dates or specifics of his multiple conversations with Dean: an example of inappropriately weighing the evidence and making credibility determinations. *Reeves*, 530 U.S. at 150.

[6] Hardage testified that Dean was sitting next to him when she saw Sparks conspicuously put her foot in Hardage's crotch, heard Hardage ask her and others for help, and witnessed Hardage remove Sparks' foot from his crotch. App. 154-156. Dean also witnessed Sparks' ongoing flirtation and, despite Hardages's complaints to her, made a mockery of the harassment and continued to force Hardage into situations where he was alone with Sparks. App. 154-156. The majority's conclusion that Dean "could have" perceived Sparks' behavior as being merely flirtatious is inconsistent with Hardage's testimony and the standard that judges should not weigh the evidence and discredit testimony on a motion for summary judgment. App. 17.

Q. Okay. Who complained to you?
A. Hugh Hardage.

App. 161.

2. CBS Did Not Act To Prevent And Correct The Harassment.

CBS did not satisfy the first prong of the *Faragher/Ellerth* affirmative defense because a reasonable juror could conclude from the evidence that CBS did not exercise reasonable care to *both* "prevent *and correct promptly* any sexually harassing behavior," after it became aware of the unwanted sexual advances:

- CBS did not grant Hardage's repeated requests that Dean not put him in situations where he would be alone with Sparks. App. 88.

- Although Hardage asked Dean to talk to Sparks about the harassment, Dean refused, and instead, passed the responsibility on to someone else.

> At that moment I said to him, "I am going to tell Ray." And he said, "I just want you to talk to her. I want you to talk to Kathy." and I said, "I cannot do that. I'm going to tell Ray [Rajewski]."

Dean testimony, App. 161.

- When Dean asked Ray Rajewski, an Executive Vice President of CBS, to talk to Hardage, Rajewski *refused* and told her that he was going to call Paul Falcone instead. App. 161-162.

- When Falcone visited Seattle *for other business*, the only time allotted to discuss Hardage's harassment complaint was during the car ride to the airport. App. 6. While Hardage was driving and concentrating on the road, Falcone and Hardage spent five or ten minutes talking about the weather and baseball and then discussed Sparks' unwanted sexual advances for 15 to 20 minutes. App. 164.

- During the car ride, Hardage told Falcone about Sparks' unwanted sexual advances, said he wanted it to stop, and asked Falcone what his options were. App. 28, 167. In response, Falcone ignored CBS' policy for dealing with

sexual harassment and instead told Hardage that he had three options: (1) "do absolutely nothing," (2) "go to Kathy yourself" and "just talk about perception management" or (3) Falcone could talk to Sparks "very nicely" and say, "regardless of what the reality is, the perception does exist that it's getting a little awkward and it's getting a little uncomfortable and I would just ask you to please, let's just lay back a little bit." App. 28. Falcone promised that with the last option, Sparks would not get into trouble. App. 28, 165. These were the only options CBS provided to Hardage.

- Despite Hardage's repeated requests for assistance, and requests for Dean to talk to Sparks, no one at CBS talked to Sparks about her sexually harassing behavior and no one asked Hardage to detail the specifics of the harassment.[7] Instead, Falcone told Rajewski that "it didn't even need to be brought to Kathy Sparks' attention." App. 6.

- Rather than talk to Sparks about her harassing behavior, Dean told Hardage that he should "just do it and get it over with." App. 6, 15.

C. The Ninth Circuit Majority Opinion Conflicts With Several Opinions In Other Circuits.

CBS argues that the Ninth Circuit majority opinion is in accord with *Arrieta-Colon v. Wal-Mart Puerto Rico, Inc.*, 434 F.3d 75 (1st Cir. 2006); *Clark v. United Parcel Service, Inc.*, 400 F.3d 341 (6th Cir. 2005); and *Smith v. First Union National Bank*, 202 F.3d 234 (4th Cir. 2000). (Br. in Opp. 7-8). However, in *Clark* and *Smith*, the courts found that an employer cannot benefit from the *Faragher/Ellerth* affirmative defense at the summary judgment stage when there is evidence that the employer *may* not have taken

[7] While Falcone testified that he called Hardage to follow up two weeks after the car ride, that testimony should never have been considered in support of CBS' motion for summary judgment, because *Hardage* did *not* remember such a conversation, and Falcone was an interested witness. *See Reeves*, 530 U.S. at 151. When Hardage did attempt to contact Falcone after the car ride, he was unavailable. App. 89-90.

reasonable care to prevent *and promptly correct* harassing behavior. *Clark*, 400 F.3d at 350-51; *Smith*, 202 F.3d at 246. In *Arrieta-Colon*, the court found, as a matter of law, that the employer was not entitled to a *Faragher/Ellerth* jury instruction because the employer did not enforce its policy against harassment and it took no actions to correct the harassing behavior. 434 F.3d at 87.[8]

And, in *Howard v. Winter*, 446 F.3d 559, 570 (4th Cir. 2006), the court addressed whether a jury should determine the reasonableness of an employer's response to a vague complaint about unwanted touching by a coworker. The employer argued that the complaint of unwanted touching did not put it on notice of sexually harassing conduct. *Id.* But the court disagreed and held that summary judgment was improper, because, "at the very least," a jury could find that it was unreasonable for an experienced human resource officer not to ask follow-up questions to determine the exact nature in which the coworker had put his hands on the employee and to merely ask the employee to notify human resources if something happened again later. *Id.*

Similarly, Falcone did not ask Hardage about the specifics of Sparks' repeated unwanted sexual advances or conduct any investigation to find out and told Hardage that he had a resource if he got into "any situations where you feel like it's becoming more than uncomfortable." App. 25, 166. Therefore, the Ninth Circuit's opinion dismissing Plaintiff's claims on summary judgment, based on the holding that CBS established the *Faragher/Ellerth* defense as a matter of law, is in conflict with the First, Fourth, and Sixth Circuits.

D. CBS Failed To Prevent And Correct Sparks' Harassing Behavior After Hardage Sought CBS' Assistance.

Hardage did not advocate for CBS to do nothing, as CBS argues. He asked Dean to talk to Sparks. After his request was

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[8] *See*, App. 163, illustrating CBS' policy to act on anything that "arguably could be conceived as harassment" regardless of the employee's desire to keep the complaint confidential.

passed to Rajewski, who did nothing, and Falcone, he was provided three options that were not reasonably calculated to prevent and correct harassment and sent Hardage a message that he should just deal with it on his own – as did Dean's advice of just doing it and getting it over with.

Based on *Falcone's* deposition testimony, CBS alleges that Hardage denied any sexual touching. According to Falcone, he asked Hardage whether Sparks had touched him in a way *that made him feel as though he couldn't do his job*. App. 164. There is no testimony by Hardage or a disinterested witness corroborating Falcone's testimony; therefore, it is not properly considered in support of CBS' motion for summary judgment. *Reeves*, 530 U.S. at 151. Even if it were, Hardage's alleged statement that the touching had not rendered him incapable of performing his job does not constitute an admission that the conduct was acceptable. Regardless, it is undisputed that Falcone understood that Hardage was complaining of repeated unwanted sexual advances. App. 15, 25.

Because CBS was on notice of the unwanted/harassing sexual advances and it took *no* corrective action, the cases relied upon by CBS in pages 10-14 of its Brief in Opposition are inapplicable to the issue here.

In several of those cases, the *Faragher/Ellerth* affirmative defense was not applied.[9] In other cases cited by CBS, the employer was not on notice.[10] In cases that CBS

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[9] *Torres v. Pisano*, 116 F.3d 625, 638 (2d Cir. 1997) (Before this Court created strict liability for supervisor harassment and the *Faragher/Ellerth* affirmative defense, *Torres* court applied a more lenient negligence standard of liability that now applies only to coworker harassment.); *Durkin v. City of Chicago*, 341 F.3d 606, 612, 613 (7th Cir. 2003) (Court applied a negligence standard of liability and did not apply the *Faragher/Ellerth* affirmative defense. Employer did not have notice of sexual harassment because "she complained about matters that were not sexual in nature" but instead related to "unexplained animosity").

[10] *Ferraro v. Kellwood Co.*, 440 F.3d 96, 99, 102-103 (2d Cir. 2006) (plaintiff did not tie her complaint of harassment to any prohibited animus and refused, when requested, to answer questions about the harassment); *Caridad v. Metro-North Commuter Railroad*, 191 F.3d 283, 290, 295 (2d Cir. 1999) (plaintiff "testified that although she complained that she was

(Continued on following page)

argues are consistent with the Ninth Circuit, the employers in those cases took prompt corrective action upon receiving notice.[11]

Here, CBS knew that Hardage's complaint was tied to sex, because he unambiguously complained about repeated, unwanted sexual advances. Yet, CBS did not endeavor to investigate or remedy the harassment, but instead refused to talk to Sparks and advised Hardage to deal with the unwanted sexual advances on his own.

Contrary to CBS' argument that Hardage prevented CBS from investigating the harassment, Hardage specifically asked Falcone "what are my options? How do you *usually* handle these things?" (emphasis added). App. 28, 164. Hardage did not select one of Falcone's equally ineffective and illegal options until *after* Falcone suggested they were the only options available. App. 29. CBS' circular argument that it acted reasonably to correct harassment by providing Hardage with the option of doing nothing, while arguing that Hardage acted unreasonably by accepting that option is inconsistent with the purpose of the *Faragher/Ellerth* affirmative defense.

Unlike the prompt corrective action by the employer in *Madray* and *Perry*, Hardage specifically asked Dean to talk to Sparks, she refused, and CBS never carried out an investigation or took any remedial action. Had CBS followed the employer's example in *Perry*, by issuing a restraining order against Sparks, investigating, taking

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treated poorly, she never mentioned [her supervisor's] sexual harassment." Also undisputed that the employer "endeavors to investigate and remedy problems reported by its employees.") *Id.*, at 295.

[11] *Brown v. Perry*, 184 F.3d 388, 396, 397 (4th Cir. 1999) (court limited its application of the affirmative defense to a single incident of harassment that occurred in September of 1993. Employer established the first prong of the affirmative defense because after the September incident, the employer immediately issued a restraining order and took corrective action against the harasser, agreed to investigate, issued a formal apology, and ensured no contact between the employee and the harasser); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1301 (11th Cir. 2000) ("plaintiffs [did] not dispute that [the employer] responded promptly to end their harassment" upon their complaint of sexually harassing behavior).

corrective action against Sparks, issuing a formal apology to Hardage, and ensuring no contact between Hardage and Sparks, this lawsuit would not have occurred.

E. Hardage Does Not Seek A Rigid Rule.

Hardage is not asking this Court to require detailed fact finding investigations in response to all complaints of harassment. Rather, Hardage is asking the Court to define the standard required of an employer to prevail, as a matter of law, by asserting the *Farragher/Ellerth* affirmative defense.

Consistent with *Faragher*, *Ellerth*, and *Reeves*, summary judgment in favor of the employer is improper where a reasonable juror could conclude that the employer did not act to reasonably prevent and correct harassing behavior. The role of judging credibility, weighing the evidence, and making the ultimate determination of reasonableness should be left to the jury. In fact, CBS admits in its opposition brief that *Faragher* and *Ellerth* "set a 'reasonableness' standard both for employers and employees and which requires a context-sensitive analysis driven by the particular facts of the case." (Br. in Opp. 6). Juries, not judges, should make the context sensitive analysis of the facts.

II. CONCLUSION

Here, the employer had knowledge of sexually harassing behavior, failed to follow its own policies requiring an investigation, talk to the harasser, or ask the victim for specific details about the harassing behavior, and instead offered the employee options to do nothing or handle the harassment himself. In this scenario, which is a very typical fact pattern in a sexual harassment case, a jury, *not a judge*, should determine whether the employer has established the prevent *and* correct prong of the affirmative defense by a preponderance of the evidence.

Respectfully submitted,

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June 2, 2006

Mr. William K. Suter, Clerk
U.S. Supreme Court
1 First Street N.E.
Washington, DC 20543-0001

Re: *Hugh Hardage v. CBS Broadcasting, Inc., et al.*
Case No. 05-1399

Dear Mr. Suter:

Petitioner Hugh Hardage has filed a petition for writ of certiorari in this case. In view of the fact that the case clearly does not warrant review by the Court, as shown by the opinion below, respondents CBS Broadcasting, Inc., et al., waive the right to file a brief in opposition. Please find Respondent's Waiver enclosed.

If the Court wishes to see a brief in opposition, we will, of course, promptly file one.

Respectfully submitted,

Davis Wright Tremaine LLP

/s/ Harry J.F. Korrell

Harry J.F. Korrell

Encl.
cc: Randa Soudah, Esq.
Claudia Kilbreath, Esq.

WAIVER

SUPREME COURT OF THE UNITED STATES

Supreme Court Case No. 05-1399

Hugh Hardage (Petitioner) v. CBS Broadcasting, Inc., et al. (Respondent)

I DO NOT INTEND TO FILE A RESPONSE to the petition for a writ of certiorari unless one is requested by the Court.

Please check one of the following boxes:

☑ Please enter my appearance as Counsel of Record for all respondents.

☐ There are multiple respondents, and I do not represent all respondents. Please enter my appearance as Counsel of Record for the following respondent(s):

_____

_____

I certify that I am a member of the Bar of the Supreme Court of the United States (Please explain if your name has changed since your admission):

Signature /s/ Harry J.F. Korrell

Date June 2, 2006

(Type or print) Name Harry J.F. Korrell

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A COPY OF THIS FORM MUST BE SENT TO PETITIONER'S COUNSEL OR TO PETITIONER IF *PRO SE*. PLEASE INDICATE BELOW THE NAME(S) OF THE RECIPIENT(S) OF A COPY OF THIS FORM. NO ADDITIONAL CERTIFICATE OF SERVICE IS REQUIRED.

SEE REVERSE FOR INFORMATION CONCERNING THE STATUS OF A CASE ON THE DOCKET.

CC: Claudia Kilbreath, Counsel of Record for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HUGH HARDAGE, Plaintiff, vs. CBS BROADCASTING, INC., a New York corporation; et al., Defendants.	)	NO. CV02-1303C

DEPOSITION UPON ORAL EXAMINATION
OF
HUGH LEE HARDAGE, III
VOLUME I

9:10 a.m.

January 30, 2003

1501 Fourth Avenue, Suite 2600

Seattle, Washington

Michael Mills

Court Reporter

* * *

[190] I didn't tell her about the groping incidents. Again, she saw one of them herself, so –

Q. Which one do you think she saw?

A. She saw Easter Sunday, where she – her husband, I believe it was James on the end of the table, and Tim, were trying to get her out from underneath the table. I asked for a little help from that side of the table to get her up. And I took her foot and put it out of my crotch.

Q. And where was Ms. Dean at this point?

A. Sitting right next to me at the table, right to my right.

Q. And you believe she saw Ms. Sparks put her foot in your crotch?

A. I do.

Q. How could she see that?

A. Well, because Ms. Sparks's head was under the table, and I had her foot in my hand, and I'm like, "Can you guys – like her foot's in my crotch; can you guys give a [little] help over here?" So –

Q. I mean had she slipped and fallen?

A. That would be –

No. No, she had not slipped and fallen. There [191] would – you know, if she slipped and had fallen or – you know, she would come completely off.

I mean it was an obvious, blatant attempt to put her foot in my crotch. Like I said, her head was in the seat of the table. The table was as far across as you guys are, so it's not like you can just stick a foot out and it's in a crotch. You – her head was on the bench of the table, and she was, you know, laying all back like that.

Q. And you believe Ms. Dean saw that, correct?

A. I do.

Q. Did she see anything else that you're aware of?

A. Just – just maybe some flirtation. It was a running joke with Patty about trying to set us up. And, you know, I – I mentioned earlier that Patty made comments to the effect of, you know, "why don't you just go ahead and do it; maybe it will put her in a better mood," or –

Let's see. What else did she used to say? She just –

Oh, "If you do it, I just don't want to know, I don't want to know, you know, if anything happens."

And she made a mockery, you know, the – the time that we went to Kingfish, I was really upset about having to go to that, because I had told them on numerous occasions, "I don't want to" –

And they were like, "Well, Mary's going to be [192] there," you know, her mother.

Q. Didn't you invite them – didn't you invite Ms. Sparks and her mother out to dinner?

A. No, I got – I got forced into that because Patty and Mitch couldn't go, and they said, "You're the only one left; you got to take them to dinner."

* * *

The Honorable John C. Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HUGH HARDAGE, an individual, Plaintiff, v. CBS BROADCASTING, INC., a New York Corp.; VIACOM TELEVISION STATIONS, INC., a Delaware Corp.; VIACOM BROADCASTING OF SEATTLE, INC., a Delaware Corp.; and KATHY SPARKS, an individual, Defendants.	NO. CV02-1303C **DECLARATION OF HUGH HARDAGE IN OPPOSITION TO DEFENDANTS CBS AND DEFENDANT KATHY SPARKS MOTIONS FOR SUMMARY JUDGMENT** **NOTE ON MOTION CALENDAR:** **September 5, 2003**

HUGH HARDAGE certifies and states as follows:

1. I have personal knowledge of the facts set forth below, am over the age of 21 am competent to testify.

2. In addition to the major incidents of harassment, including several instances of groping and inappropriate comments by Ms. Sparks which I discussed in my deposition, there was also a more subtle, ongoing form of harassment by her. I did not elaborate on this in my deposition because I understood the questions regarding specific instances of sexual harassment to be targeted at the overt instances of harassment.

3. As I discussed with Paul Falcone, I felt that Ms. Sparks had more than a professional interest in me. Specifically, she made me aware that she wanted to date me, and otherwise see me on a personal level, something which I repeatedly rejected. She did so on almost every occasion she was in the Seattle office of KSTW which was approximately one to two times a week. She would do so by making flirtatious comments to me, such as "You need somebody that's older and more stable that can take care of you." Almost every time she was in the Seattle office of KSTW, Ms. Sparks would camp out in my office, occasionally putting her feet up on my desk. She did not do this in other managers' offices. During these interactions, Ms. Sparks was openly flirtatious with me. It was abundantly clear to me based on her behavior, and the inordinate amount of time she spent in my office, that she was interested in me sexually.

4. Patricia Dean, the General Sales Manager and my immediate superior, was aware of this ongoing behavior by Ms. Sparks. Indeed, after observing this type of behavior, Ms. Dean would often make comments about trying to set me up with Ms. Sparks, such as, "Why don't you just go ahead and do it; maybe it will put her in a better mood."

5. This more subtle harassment occurred on an ongoing basis and was very uncomfortable to me. Moreover, Ms. Dean, my immediate supervisor, was aware of my discomfort, and did nothing to remedy the situation.

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Signed at Seattle, Washington this 21st day of August, 2003.

/s/ Hugh Hardage
HUGH HARDAGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HUGH HARDAGE, Plaintiff, v. CBS BROADCASTING, INC., a New York Corp.; VIACOM TELEVISION STATIONS, INC., a Delaware Corp.; VIACOM BROADCASTING OF SEATTLE, INC., a Delaware Corp.; and KATHY SPARKS, an individual, Defendants.	)	NO. CV02-1303C

DEPOSITION UPON ORAL EXAMINATION OF PATRICIA DEAN

March 25, 2003
9:05 a.m. to 11:35 a.m.

Held at the Law Offices of
SHORT • CRESSMAN & BURGESS, PLLC
999 Third Avenue, Suite 3000
Seattle, Washington

REPORTED BY: **Jeanne M. Gersten, RMR, CSR**
Registered Merit Reporter
Paradise-Sherman Deposition Reporting
Phone: (206) 937-9782

* * *

[18] Q During the time that you have worked for KSTW, has anyone ever come to you with a complaint of sexual harassment?

A Yes.

Q When was that?

A I don't know. I don't know the actual date.

Q Okay. Who complained to you?

A Hugh Hardage.

Q Okay. Do you remember the approximate time frame when, Mr. Hardage complained?

A He came to see me in – He came to see me one morning before a scheduled sales meeting.

Q Okay. If I could just back up for a moment. Did Mr. Hardage view the tape?

A Yes.

Q Okay. Do you recall if his complaint of sexual harassment was before or after he viewed the tape?

A I believe it was after.

* * *

[21] A At that moment I said to him, "I am going to tell Ray." And he said, "I just want you to talk to her. I want you to talk to Kathy." And I said, "I cannot do that. I'm going to tell Ray."

* * *

[24] A I said, "Hugh had come to my office, and he was upset about some comments he thought that Kathy

had made that embarrassed him in front of you. And he also said that there have been some comments made in the past, and he wanted me to speak to Kathy. And I told him that I was [25] going to talk to you about it. Would you call Hugh?" And Mr. Rajewski said, "No, I'm going to hang up the phone, and I will call Paul Falcone."

* * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

HUGH HARDAGE, PLAINTIFF, VS. CBS BROADCASTING, INC., A NEW YORK CORP.; VIACOM TELEVISION STATIONS, INC., A DELAWARE CORP.; VIACOM BROADCASTING OF SEATTLE, INC., A DELAWARE CORP., AND KATHY SPARKS, AN INDIVIDUAL, DEFENDANTS.	NO. CV02-1303C

DEPOSITION OF PAUL FALCONE
WEDNESDAY, FEBRUARY 12, 2003

FILE NO.: 030212SEG

REPORTED BY: SHERY GARGIR, CSR 11313, RPR

* * *

[34] If the employee brings something forward that arguably could be conceived as harassment, we act on it. We have no discretion to let the employee say, "Oh, Paul, I just wanted to tell you this in confidence."

* * *

[39] Q All right. How did you become aware that Mr. Hardage was having some kind of a problem?

A Cassie Thomas, C-a-s-s-i-e. Cassie Thomas is the vice president of human resources and in my former role as director of employment and development, I reported to Cassie.

Ray Rajewski called Cassie and said, "Cassie, I've heard about something that happened up at KSTW. I know that Paul is flying up there next week. Could you guys come over? I want to just talk to you about it."

* * *

[43] Q What did you and Mr. Hardage discuss?

A I thanked him for driving me. We had five or ten minutes of small talk about the weather and the baseball game and whoever knows and I said, "So, Hugh, what's cooking? What can I help you with?

And he proceeded to talk to me probably 15 maybe 20 minutes about the situation with Kathy Sparks.

* * *

[44] A Typically when I talk to people and what I told Hugh in this case was, I said – first question was – "Hugh, is there anything that's gone beyond the bounds of appropriateness in terms of touching and **I mean is it like you feel like you can't do your job?** How serious is this issue?" [Emphasis added]

* * *

[45] He said, "What are my options? How do you usually handle these things?"

And I said, "Any employee in this kind of situation is going to have three options."

I said, "Option one is to do absolutely nothing and hope it solves itself."

And I said, "Although most employees will handle it that way, I don't recommend it. I don't think these things necessarily get better. I think you have to be strong enough to be able to open it up respectfully and nicely without offending anybody. So the second choice you would have would be to go to Kathy yourself."

And I said, "Hugh, just talk about perception management. People tend not to get really angry if you talk about perceptions because they don't feel like you're accusing them.

"And you might want to tell her, Kathy, listen, I just perceive that maybe there are some feelings that are developing on your end and, you know, I enjoy working here and I enjoy working for [46] you and I don't think it's a good company policy to get involved physically with other members of the company and I hope that you would respect that.

"So if you take that tone, I doubt that she's going to scream and yell and throw something at you. I mean, typically people don't respond that way. It's actually a nicer way to do it and people kind of get the message and we're adults. We can handle it that way."

I said, "Your third choice, and what I'm happy to help you with is, I can take that role for you. I'm not going to call her up and yell at her and get her in trouble. I don't want you to think that. That's not my style."

I said, "I know we don't know each other all that well but sometimes people fall in love in the workplace even if they don't mean to but we spend so much time with the

people in the workplace and we have so much in common with them that feelings sometimes develop."

So I said, "I can very nicely talk with her and say, 'Kathy, listen, regardless of what the reality is, the perception does exist that it's getting a little awkward and it's getting a little uncomfortable and I would just ask you to please, [47] let's just lay back on this a little bit.'"

* * *

If you get into any situations where you feel like it's becoming **more than uncomfortable**, I just want you to know that you have a resource here." [Emphasis added]

* * *

[LOGO] CBS

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VICE PRESIDENT AND ASSOCIATE GENERAL COUNSEL
LABOR AND EMPLOYMENT RELATIONS

VIA AIRBORNE EXPRESS February 21, 2002

Cheryl Milner, A D R Prog. Assistant
Equal Employment Opportunity Commission
909 First Avenue, Suite 400
Seattle, WA 98104-1061

Re: Hugh Hardage v. KSTW Television
Charge No. 380A200364

Dear Ms. Milner:

This letter is KSTW-TV's response to the above matter.

* * *

During the course of their drive, Mr. Hardage told Mr. Falcone that he was having a problem with Ms. Sparks that he wanted to bounce off of him. Mr. Hardage then said that Ms. Sparks had been "hitting" on him, that it was making him uncomfortable and that he wanted it to stop.

* * *